Nos. 83-66 and 83-254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COLOMA BD. OF ED., et al.,

Petitioners,

v.

BARBARA JEAN BERRY, et al.,

Respondents.

ZELMA FELLNER, et al.,

Cross-Petitioners,

v.

BARBARA JEAN BERRY, et al.,

Respondents.

CONSOLIDATED OPPOSITION OF BARBARA JEAN BERRY, RESPONDENTS, TO PETITIONS FOR CERTIORARI OF FELLNER AND COLOMA BOARD OF EDUCATION

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PLAINTIFFS'-RESPONDENTS' CONSOLIDATED OPPOSITION TO THE PETITIONS FOR CERTIORARI OF THE COLOMA DEFENDANTS AND THE SODUS INTERVENORS

STATEMENT OF ISSUES

This is a school desegregation case, in which three local school districts, a county school district and state education officials took actions with the intent and impact of creating racially segregated schools in Benton Harbor, Michigan.

The single issue before the Court in these two petitions is whether the district and circuit courts abused their discretion, after full and lengthy evidentiary trials on both liability and remedy, in finding inter-district violations and ordering modest and limited inter-district relief carefully tailored to reverse the impact of the adjudicated violations.

Plaintiffs-Respondents contend that the answer in each instance is NO, that the actions taken below were permissible and not an abuse of discretion, that each were supported by strong record evidence, and that no basis in either law or fact exists for this court to grant the Writs sought.

FACTUAL STATEMENT

Plaintiffs accept, essentially and with the exceptions noted hereinbelow, the statement of facts set forth by the Coloma

petitioners.[1/] Plaintiffs reject as devoid of record support the statement of facts of the Sodus Intervenors (Fellner, et al.).

A. THE EAMAN TRANSFER TO COLOMA

As set forth in the Coloma factual statement, this transfer was consummated in 1970, by action of the State Board of Education. The State Board's approval of the transfer came despite the expressed opposition of the Benton Harbor and Intermediate School District Boards, the strong recommendations against the transfer from each of two of the State Board's own Hearing Officers, after separate hearings and the strong and explicit opposition to the transfer by the State Board's own chief executive officer, the State

1 / See page 2 of Coloma petitioners' Brief.

Superintendent of Public Instruction. The Coloma Board, while declining to state either opposition or support at the hearings before the Intermediate District Board,[2] took definite action to indicate its actual support for the transfer by the time the matter had arrived at the State Board.

Not in dispute is that the State Board approval action was taken despite explicit notice of the pendency of the lawsuit filed in 1967 charging de jure conduct in the creation of public school segregation in Benton Harbor.[3] This notice came to the State Board through the statements of the Benton Harbor Board's counsel, when he

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2 / See p. 22-A, Coloma Petitioners' Appendix, Judge Hillman's Remedial Decision.

3 / See p. 17-A, Coloma Petitioners' Appendix, Judge Hillman's Remedial Decision.

appeared on behalf of Benton Harbor to oppose the transfer. He stated that he had been unable to make an earlier hearing before the State because he had been in trial in the school discrimination case, and he also informed the state officals that the transfer would involve an area in which all the residents and students were white, from the majority-black Benton Harbor School District, at a time the district was still trying to effect stability from an earlier consolidation of some 17 smaller districts. He also informed the state official that approval of the transfer would amount to an independent act of de jure segregation on the part of the state, specifically noted the racial motivations of those seeking to leave the Benton Harbor district, and pointed out that the Coloma District to which the territory would be transfered was itself

virtually 100% white.[4/]

The number of students involved was approximately 150/year, a fact not in dispute. Also not in dispute is that the Coloma Board, after having appeared before the State Board on other occasions to state explicit opposition to property transfers in which they were interested, failed to either appear or state opposition to the transfer of this Eaman area, despite its knowledge of Benton Harbor's strong opposition based in part on fears of increasing racial segregation within Benton Harbor were the transfer approved.

Also not in dispute is that the area transferred, in addition to containing 150 white students, contained a school building and other residential property of considerable

4 / See 467 F Supp. 630, p. 647 Interdistrict-Liability Opinion of Judge Fox.

financial value to the Benton Harbor district, which stated these as additional reasons for its opposition to the transfer's approval. This information was put before the State Board prior to its approval action, through the reports of the Superintendent and the two separate reports of the State Hearing Officers, as well as through the Benton Harbor testimony and that of the black and white Benton Harbor citizens who came to the hearing and opposed the transfer.[5/]

The State Attorney General, charged by state law with providing legal representation and advice to the State Board, was also aware of the pendency of the school discrimination litigation involving Benton Harbor, knowledge received prior to the final State Board action approving the transfer.

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5 / Id. at p. 634.

Finally, the State Board was explicitly told that approval of the Eaman transfer to Coloma would trigger other transfer petitions from white areas of Benton Harbor, by white residents also seeking to escape the majority-black Benton Harbor district, and that these predictable efforts would thwart any Benton Harbor plans to stabilize the newly-consolidated district and further segregate the schools in Benton Harbor.[6/] Ibid.

B. THE SODUS TRANSFER TO EAU CLAIRE

Immediately after the initial State Board approval of the Eaman transfer, and as predicted by the Benton Harbor Board, a series of other transfer petitions were filed from white areas of Benton Harbor, each seeking to escape to an adjacent white school district. One such petition came from residents of the predominantly white Sodus

6 / Id., p. 646-467.

area.

The initial Sodus petition included an area which was predominantly black, even though the racial composition of the area sought to be transfered was overwhelmingly white. This petition to transfer was strongly opposed by Benton Harbor's Board, opposed by the Eau Claire Board, opposed by the Intermediate District Board, opposed by the State Hearing Officer, opposed by the State Superintendent of Public Instruction, and disapproved by the State Board.[7/]

At the hearings on this initial Sodus petition, the Eau Claire Superintendent, on behalf of the Eau Claire Board, indicated that his district would not have opposed the transfer if it had been comprised of less territory and students. The territory which

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7 / Id., p. 656.

the Eau Claire Superintendent indicated should not have been included happened to be the precise territory which was the predominantly black portion of the first transfer attempt.[8]

Educated by the nature of the Eau Claire opposition to the first Sodus transfer attempt, the Sodus petitioners submitted a second transfer petition which, like the first petition, sought to join the Sodus area with Eau Claire. It just happened to be the case that the territory included in the Sodus II transfer petition concided precisely with what the Eau Claire Superintendent has stated Eau Claire would not oppose receiving.

By the time this Sodus II transfer petition reached the Benton Harbor Board for its response, school board elections in Benton Harbor had resulted in the election of a

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8 / Id., p. 682-683.

majority of white Board members who had earlier stated their explicit support for the various transfer petitions then pending. Indeed, some of the new Board members had themselves been signatories on transfer petitions which had earlier been opposed by Benton Harbor and disapproved by the Intermediate District and State Boards.[9/]

Due to the dramatic change in the Benton Harbor Board membership, the Benton Harbor Board abandoned what had been consistent and uniform opposition to all transfer attempts involving predominantly white areas seeking to join adjacent white districts. The new Board voted "not to oppose" the Sodus II transfer petition.

The Eau Claire Board, taking its cue from the Benton Harbor Board and mindful of the composition of the new territory being pro-

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9/ Id.,p. 652.

posed for transfer, also voted "Not to oppose" the Sodus II transfer.

The Intermediate District Board, after being informed of the Benton Harbor and Eau Claire Board actions, explicitly interpreted the actual positions of these two districts as "in support," and itself approved the Sodus II transfer. The Intermediate District Board stated that its approval was because of the support for this transfer by the sending and receiving districts.

The State Hearing Officer, notwithstanding the positions below of the Benton Harbor, Eau Claire and Intermediate District Boards, recommended that the transfer be disapproved by the State Board, in part because of the undeniable adverse racial impact which the transfer would have on Benton Harbor and because the transfer would have adverse educational impacts on Benton Harbor. The Hearing Officer specifically found that the

petitioning area was no closer to Eau Claire's schools than Benton Harbor's, that the Eau Claire schools were overcrowded and the Benton Harbor schools had adequate space, that the Eau Claire district had failed to obtain certification from the recognized regional certification agency, that the Sodus II area differed from the Sodus I area only in that the black portion had been stripped away, and that the transfer would have adverse financial impact on Benton Harbor.[10/]

The State Superintendent of Public Instruction also recommended against approval of the Sodus II transfer, citing the findings of the State Hearing Officer and the record testimony which produced those findings.[11/]

10/ Id., pp. 653-656.

11/ Id., p. 653.

The State Board of Education approved the Sodus II transfer petition, leading directly to the successful motion by these Plaintiffs to get an injunction from the federal district court to prevent the transfer from taking place.[12/]

Shortly after successfully enjoining the Sodus II transfer from being effectuated, Plaintiffs amended the Benton Harbor school discrimination complaint to join as additional parties the Eau Claire, Coloma, Intermediate School District and State Boards and their respective Superintendents, along with the Governor, State Attorney General and the State Municipal Boundary Commission. The Amended Complaints adding these parties charged that each had engaged in purposeful action to exacerbate the racial segregation in the Benton Harbor public school district.

12/ Id., pp. 656-658.

Plaintiffs sought to have the Eaman transfer to Coloma rescinded and vacated, to have the injunction made permanent against the Sodus II transfer, to have the added parties assist in the process of desegregating the Benton Harbor public schools, and to have appropriate injunctions to prevent recurrence of the conduct of which Plaintiffs complained.

The District Court granted intervention motions by parents representing the Eaman and Sodus II transfer areas, restricting each group of intervenors to the aspect of the case relating to their particular transfers.

PROCEEDINGS BELOW

The statement of proceedings below is essentially as set forth in the Coloma-Petitioners' submission, at page 6.

Having initially found against the Plaintiffs on major elements of their intra-district complaint against Benton Harbor, the district court was reversed in part and, on

remand, was instructed to treat the Plaintiffs' proofs as having established a prima facie case. Those proceedings included an opportunity for the added parties to participate to the extent they so chose, and resulted in a district court remand finding that the Benton Harbor defendants had failed to carry their burden and that the Plaintiffs had successfully proven de jure conduct against Benton Harbor, with entitlement to appropriate remedy (442 F Supp. 1280).

The remedy proceedings were deferred, pending the trial against the added parties. The trial against the added parties resulted in district court findings that Benton Harbor, Coloma, Eau Claire, Intermediate District and State Boards and their respective superintendents had engaged in inter-district de jure conduct. Similar findings were made against the Governor and State Attorney General, though the district court granted

the motion to dismiss of the State Municipal Boundary Commission at the conclusion of Plaintiffs' case against the added parties (467 F Supp. 630).

In a separate proceeding, the district court considered the appropriate remedial relief, in light of the violation findings which had been made. To assist the Court in evaluating remedial options, the district court fashioned a panel comprised of the Benton Harbor, Coloma, Eau Claire and Intermediate District Superintendents, to be chaired by the State Superintendent, with instructions to submit a proposed remedial plan, along with any minority recommendations. This panel submitted its recommendations, as did the Benton Harbor Board as a minority report. Plaintiffs also sumbitted remedial recommendations to the Court.

The Court appointed a three-member Panel of Experts to review and evaluate the various

remedial recommendations, with instructions that it was to recommend either one of the options before it, some amalgam of those options or, if it decided none of the options were adequate and responsive to the Court's violation findings and remedial instructions, its own remedial plan. The Panel chose to submit its own remedial plan, borrowing some elements from the options before it but substantially differing from each option.

The District Court essentially adopted the Panel's remedial recommendations, after a remedial hearing at which testimonial and documentary evidence was received.[13/]

Prior to implementation of the district court's remedial plan, the district judge's health required him to recuse himself from the further proceedings in the case. The

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13/ Coloma Appendix at p. 23-A, Judge Hillman's Remedial Opinions.

new judge was immediately faced with new trial motions from each of the adjudicated defendants, along with motions to reconsider the remedial plan ordered into effect.

The new district judge denied each of the new trial motions, but decided to revisit the question of appropriate remedial relief. After an additional remedial hearing, the district court issued the remedial order which forms the basis for these Petitions.[14/]

The Court of Appeals affirmed the district court's findings of violation against each of the adjudicated defendants, and affirmed the remedial order of the district court.[15/]

14/ Coloma Appendix at p. 14-A, Judge Hillman's Remedial Opinion.

15/ Coloma Appendix at p. 7-A with circuit opinion affirming district court.

ARGUMENT

I.

THE PROCEEDINGS BELOW,CONFORMED WITH THE APPLICABLE FEDERAL RULES, PROVIDED EACH PETITIONER A FULL AND FAIR OPPORTUNITY TO MAKE AN ADEQUATE RECORD AND DENIED NO PARTY DUE PROCESS

As set forth above, each of the adjudicated defendants, including these Petitioners, was afforded a full and fair opportunity to adduce and present such evidence as would tend to support the legal positions being urged to the court.

The Petitioners-defendants were each permitted to engage in broad discovery, and did. The record below reveals the extensive discovery which was conducted by all the parties, including these Petitioners.

The Petitioners were permitted to participate in all phases of the liability proceedings which took place after they were joined, and all the pertinent liability proceedings took place after these defendants

became full parties. The Petitioners presented fact and expert witnesses designed to support their legal positions and view of the facts, and had a full opportunity to convince two separate district court judges of that view. The Benton Harbor defendants, not Petitioners here, had an opportunity to convince three separate judges, since the present judge is the third district court judge to preside over these proceedings.[16/]

The District Court did not limit the ability of these Petitioners to proffer evidence or witnesses, nor to examine such evidence or witnesses as were put forth by other parties, including the Plaintiffs-Respondents.

The second set of remedial hearings held

16/ The initial District Judge was Wallace Kent. The second District Judge was Noel Fox. The third and present District Judge is Douglas Hillman.

by the present presiding judge resulted in a remedy considerably more modest than the initially ordered plan. This fact alone establishes that the Petitioners were given every opportunity below to make their record and produce bases for either non-liability or to limit their inclusion in the reach of any remedial relief ordered. The initial remedial plan would have consolidated the three local districts, required student and staff reassignments within the entire consolidated area, and fundamentally altered the nature and character of all three districts. The relief ordered by the present judge, which Plaintiffs resisted as inadequate in the face of the record evidence and violation findings, merely required that the transferred territory be returned to Benton Harbor, enjoined further similar transfers, enjoined student transfers which would be segregative, and required the Coloma and

Eau Claire districts to make available seats for Benton Harbor black students, should any so choose.

The Sixth Circuit review and affirmance of the lower court orders on liability and remedy likewise afforded each Petitioner a full and fair opportunity to be heard on all pertinent issues presented.

II.

THE LIABILITY FINDINGS BELOW WERE BASED ON SOLID AND CREDIBLE RECORD EVIDENCE, ADDUCED AFTER FULL EVIDENTIARY PRESENTATIONS BY ALL PARTIES, AND DO NOT REPRESENT EITHER AN ABUSE OF DISCRETION OR CLEARLY ERRONEOUS LOWER COURT ACTIONS

The issue before this Court on the Petitions presented is not whether there were other factual findings which the courts below could have made, but whether the record is devoid of support for the findings of liability which were made.

A. <u>The Eaman Transfer of Coloma</u>

The District and Circuit Courts were both

entitled to find, on the record before them, that Coloma's protestations of innocence were not credible, and did so find.

The district court noted that Coloma had previously appeared before the State Board and stated explicit opposition to property transfers in which it had no interest. The Court was entitled to disbelieve the Coloma assertion that its non-appearance was because it assumed the State Board would deny the transfer, based on previous state actions.

The district court was aware that, had Coloma actually opposed the transfer, it had ample opportunity to demonstrate this opposition: there was a hearing before the State Hearing Officer; there was a second hearing before the State Board itself. The district court was entitled to believe that, had Coloma actually opposed the Eaman transfer, it would have found some means at one of the above five, separate, hearings to mouth that

opposition.

The District Court also had testimony before it, which it credited, showing that a teacher in the Coloma District had been a State Representative, and had served on the Legislature's Education Committee. This teacher, with the full knowledge of the Coloma officials, led the lobbying effort at the State Board level in support of the Eaman transfer approval. The District Court knew from the record evidence that, on at least one occasion, the former State Representative was able to make the journey from Coloma to Lansing to lobby for this transfer only because the Coloma Superintendent, himself, substituted for and taught the class of the missing teacher.[17/]

17/ See 467 F Supp. 630 at pp. 674-676, 680 Judge Fox's Interdistrict Liability Opinion concerning former State Representative Mattheeussen.

The District Court knew, from record evidence it credited, that Coloma had been unsuccessful in passing a much sought after bond issue, and that the Coloma officials let the petitioning Eaman parents know that their support for the bond issue would be greatly desired. The courts below were entitled to believe that the promised electoral support for the bond issue which came from the Eaman parents was yet another piece of evidence negating the Coloma assertion of opposition to the transfer. The bond issue, as the Court was shown, did pass, because of the votes of the Eaman parents.

The Courts below also knew that the Coloma officials explicitly rejected the request of Benton Harbor that the school building on the Eaman transfer territory be left in the Benton Harbor district, and that the Coloma officials arranged with the Eaman parents that these parents would privately raise the

monies necessary to pay Benton Harbor for the school building being transferred, an amount in excess of $40,000. In fact, the Coloma officials were so eager to enroll the Eaman transfer students and be able to include the parents of these students in the district in time for the bond vote, they disregarded explicit instructions from the State Board and enrolled the Eaman transfer students in Coloma's schools well before the payment issue was resolved.[18/]

Based on the record evidence before it, the district court was permitted to conclude that the Coloma defense was a mere pretext, masking its undeniable eagerness to consummate and its covert assistance in obtaining approval for the Eaman transfer.

18/ Id., at p. 679

That the courts below could have drawn different conclusions from the record evidence is irrelevant, since the conclusions drawn by these courts were amply supported by the record.

B. The Sodus Transfer to Eau Claire

The district court received evidence sufficiently persuasive to permit it to find, without error, that the Eau Claire Board had not only been receptive to the Sodus II transfer, but had indeed been the virtual architect of it.

The district court was aware, from the record evidence, that the Eau Claire Superintendent was a man who had been a Benton Harbor Assistant Superintendent, had detailed knowledge of the educational and racial facts and factors relating to the Sodus I and Sodus II transfer areas, had prior knowledge of the school discrimination litigation involving Benton Harbor, knew of the numerous

other transfer petitions by white residents of Benton Harbor to escape the majority black district, knew of the substantial change in the makeup of the Benton Harbor Board and the promise by the new Board members to support the dismemberment efforts, and had detailed knowledge of the general racial composition of the Benton Harbor district and its schools. Indeed, this Eau Claire Superintendent had himself been in charge of one of the areas which had made repeated efforts to escape Benton Harbor by the same transfer petition route.[19/]

The courts below were also aware that the Sodus II petition which Eau Claire voted "not to oppose" was identical to the territorial contours of what the Eau Claire Superintendent had predicted, during the Sodus I hearings,

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19/ Id., concerning Eau Claire Supt. McAlvey at pp 682-683.

would not be opposed. And, as the record established, the courts below knew that Eau Claire's "not to oppose" position had changed to active support by the time the transfer petition reached the state officials. Indeed, Eau Claire registered its support, not non-opposition, at both the hearing before the State Hearing Officer and the State Board, as each noted.[20/]

Under these circumstances, and in light of the undenied fact that the transferred territory was significantly less-black than the Benton Harbor district's racial composition, the courts below did not err or abuse their discretion in concluding that Eau Claire had been actively involved in the events leading up to the effectuation of the Sodus II transfer, and that its earlier

20/ Fellner petitioners brief at p. 10.

"not to oppose" vote was mere pretext.

It does not matter that the courts below might have decided to credit Eau Claire's defense, given the substantial record basis for the conclusions reached below.

C. The Status of the Intervenors-Petitioners

It is significant that Eau Claire, itself, did not choose to prosecute an appeal from the lower court decision before this Court. The Intervenors who urge this Petition stand alone, as it relates to the Sodus II transfer. While the Coloma Petition generally challenges, as ultra-vires, the remedial action taken below, Coloma claims no special relationship to the Sodus II transfer petitioners, and could not do so on the record established below.

While the effort of these Intervenors is within the scope of the intervention they were granted, this Court should not ignore that the issues they raise have already been

abandoned by the State and Eau Claire boards. The State Board has already, with permission of the district court and before the district court concluded the remedial hearings, rescinded its earlier approval of the Sodus II transfer. The State Board has also adopted new procedural requirements and policies which would prevent a matter such as the Eaman or Sodus II transfers from being acted on during the pendency of school discrimination litigation of the type pending when both of these two petitions were being prosecuted. Thus, to an extent, the issue on which the intervenors wish this court to act has been mooted by the state board's decision to rescind the approval and adopt new procedures which would preclude consideration being given in the future.[21/]

21/ See 467 F Supp. 630 Judge Fox Interdistrict Liability Opinion at p. 691 and pp. 634-638.

III.

THE COURTS BELOW ACCURATELY PERCEIVED AND APPLIED THE CONTROLLING LEGAL PRINCIPLES AND THE PRECEDENTS OF THIS COURT

This Court's opinion in the Detroit case, Milliken v. Bradley, 418 U.S. 717 (1974) set forth the standards governing inter-district liability.

A review of the record below will conclusively demonstrate that the courts below were faithful to these standards, and that the requisite factual support was abundantly present in the record before them.

1. Intra-district Action Which Had An Inter-district Impact

The 1970 Coloma Board decision to support, though by covert means, the Eaman transfer had a clear impact on the adjacent Benton Harbor district. Immediately flowing from the Eaman transfer, which Coloma's support faciliated, was the loss to Benton Harbor of

property of significant financial value, the loss of 150 white students from a district which was already majority black and significantly blacker than any of the surrounding districts within Berrien County, and the triggering of a series of property transfers requests from other white parts of the Benton Harbor district which kept alive for years to come the hope of escape. As the district courts below found, these transfer attempts, though not consummated except for Sodus II, prevented the newly-formed program of education. For one thing, the white areas which entertained hope of escaping the black district refused to vote for necessary bond issues to support the district they hoped to leave, knowing that eventual success in their transfer efforts would be encumbered by the passage of such bond issues.

The 1974 Eau Claire decision and the 1974

Benton Harbor decision to support the Sodus II transfer petition resulted in the Intermediate District and State Board approvals which would effect this transfer. The area to be transfered from Benton Harbor would leave Benton Harbor a blacker and poorer district, and decidedly less capable of providing the requisite educational programs to its students. That this transfer was enjoined through the efforts of the Plaintiffs was not decisive on the question of liability, as both courts below found. It impacted on the question of remedy, and led the present district judge and Court of Appeals to approve a less comprehensive remedy than the Plaintiffs sought. The lower courts also took note of the Eau Claire acceptance of white students transferring from Benton Harbor on a tuition basis to it, with continuing devastating impact on Benton Harbor's racial composition.

All these actions--by Benton Harbor, by Coloma and by Eau Claire--had impacts which ineluctably flowed across the artificial lines separating the districts from each other, and each contributed to the racial segregation of the Benton Harbor schools and to the inability of the Benton Harbor schools to provide an equal educational opportunity to its students, a majority of whom were black.

2. Inter-district District Action, Per Se

The actions of the State Board, in approving the 1970 Eaman and the 1974 Sodus II transfer,were each explicit inter-district actions which had a racially segregative impact and intent.

The 1974 Intermediate District Board approval of the Sodus II transfer was an undeniably inter-district act, which had actual and intended segregative impacts.

The failure of the State Board to enforce

its own policy regulations and pronouncements in Berrien County, which called for denial of such racially-inspired property transfers, was an omission of intentionally segregative impact across the district lines of Benton Harbor, Eau Claire and Coloma.

3. The Remedial Actions Taken Below Comport With Milliken And Do Not Violate Columbus or Dayton

The remedial actions of the courts below were carefully tailored not to exceed the scope of the adjudicated violation, and were taken after all parties had a fair and full opportunity to be heard.

As Plaintiffs argued in the district and circuit courts, the more effective remedy would have been one which either consolidated or equally included all three districts in inter-district student and staff reassignments. The courts below, out of an abundance of caution, adopted a much more severely

limited remedial plan. The plan left all three districts intact, did not require the two offending white districts to have their students reassigned, and limited the student desegregation to such as would result from parental or student choices between the districts, while reassigning students within the Benton Harbor district itself. While we still contend that such a remedy is not the most effective response to the scope of the adjudicated violations, there can be little question that these courts did not exceed the scope of their permissible authority and discretion in ordering such a limited plan into effect. The remedial order also required that the two racially-inspired property transfers be rescinded and permanently enjoined, and that racially segregative student tuition transfers be prohibited. All of these actions were based on solid record evidence, and fall

well within this court's remedial guidelines, as set forth in Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971), Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973), and Milliken I, op. cit. The scope of the remedy does not exceed, and is arguably less than, the scope of the violations.

The remedial plan is also faithful to the holdings of this Court in both Dayton v. Brinkman, 443 U.S. 526 (1979) and Columbus v. Penick, 443 U.S. 449 (1979). In each of these cases, the Court emphasizes the remedial guidelines of Swann and Keyes, but within the reaffirmed context of the earlier admonition that the "condition which offends the Constitution" must be extirpated "root and branch," See, Green v. New Kent County Board, 391 U.S. 430 (1968), and that the remedy must be one which "promises realistically to work...now," as required by Davis v. Mobile, 402 U.S. 33 (1971) and Alexander v. Holmes, 396 U.S. 19

(1969).

The remedial plan, though it has an area-wide reach, does not go beyond the parameters of the adjudicated violation. All the adjudicated defendants are required to participate in the remedy, Benton Harbor more heavily than anyone else, Coloma and Eau Claire next most heavily, and the county and state defendants least heavily. This scaled plan recognizes that, while all of these parties engaged in culpable behavior violative of the 14th Amendment rights of the black and white school children, their conduct was not the same, nor did the similar conduct have the same consequences and impacts.

Coloma's invitation to this Court to engage in an exercise to determine the "incremental segregative effect" of the adjudicated conduct is asking the proverbial "angels on the head of pin" question. The

simple answer is that the courts below found, on solid record evidence, that the conduct of these defendants went well beyond the numerical impact of the 150 white students involved in the Eaman transfer or the 200+ students involved in the Sodus II transfer. The courts found that the racially segregative and educationally adverse impact these actions had on the Benton Harbor district was system-wide, that the conduct had thorough-going impact within each of the adjacent districts, that no less extensive remedy held out any hope of extirpating the full reach of the violations, and that the children were entitled to immediate remedial relief. The fact that it has taken from 1967, when this action was initially filed, until now to even approach finality of 14th Amendment entitlements also argues against the relief these Petitioners seek.

The Coloma decision to stand mute in 1970 when the Eaman transfer was being processed stands in stark contrast to its previous behavior on other occasions when it really did oppose a property transfer. This conduct is precisely that kind of departure from previous substantive and procedural behavior which this court found, in Arlington Hts. v. MHDC, 429 U.S. 252 (1977), indicative of racial intent.

The permanent injunction which the courts below directed at the state officials, prohibiting them from granting similarly racist property transfers or permitting similarly segregative student tuition transfers, comports with the district court orders this Court approved against a federal agency in Hills v. Gautreaux, 485 U.S. 284 (1976).

CONCLUSION

There is nothing about the remedial plan or liability findings below which warrants review by this Court. No new factual or legal ground was plowed, no new procedural techniques were employed. This is simply a case of local, country and state officials being caught red-handed in unconstitutional conduct, and being subjected to time-proven desegregative remedies designed to restore the victims of the violative conduct to the position they would have occupied, but for the violations.

For all the reasons stated above, this Court should deny both the Coloma and Fellner Petitions for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael H. Sussman, certify that on the 6th day of September, 1983, I served three (3) copies of the attached Opposition to Writs of Certiorari to the United States Supreme Court by having them sent, first class mail, postage fully prepard, in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States, to each of the following named attorneys of record:

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